Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Alliance Contact Services, *et al.*	)	CG Docket No. 02-278
	)	
Joint Petition for Declaratory Ruling that	)	
The FCC has Exclusive Regulatory Jurisdiction	)	
Over Interstate Telemarketing	)	

COMMENTS OF AARP IN OPPOSITION TO
ALLIANCE CONTACT SERVICES, *et al.'s*
PETITION FOR DECLARATORY RULING

EXECUTIVE SUMMARY

Unwanted telemarketing solicitations have been considered the number one intrusion on consumer privacy and a great source of consternation for many years. Telemarketing is routinely targeted to older Americans, who have been the victims of telemarketing fraud and harassment in numbers disproportional to the general population. Attempting to exploit an incorrect interpretation of the Federal Communications Commission's ("Commission") Rules governing interstate telemarketing, a group of telemarketers and entities that rely heavily on the services of telemarketers led by Alliance Contact Services ("ACS Coalition") has petitioned the Commission to declare that only the Commission has the jurisdiction to regulate interstate telemarketing solicitations.

What the ACS Coalition fails to recognize is that even at the federal level, the Commission does not have exclusive jurisdiction over interstate telemarketing. Rather, it shares this authority with the Federal Trade Commission ("FTC"). Furthermore, the history and plain language of the statutes granting jurisdiction over telemarketing to the Commission and the FTC expressly provide for an active role by the states in protecting their consumers from telemarketing. Additionally, telemarketing regulation is a subset of the broader category of consumer protection, an area of law in which states not only have broad authority, but also have been the traditional first line of defense. Accordingly, there is no basis in law to give credence to the petition of the ACS Coalition.

I. TELEMARKETING REMAINS AN ISSUE OF PRIMARY IMPORTANCE TO MEMBERS OF AARP

AARP is a non-partisan, non-profit organization with nearly 36 million members aged 50 and older. As the largest membership organization representing the interests of older Americans, AARP has a longstanding interest and involvement in combating telemarketing abuses and educating consumers about dealing with unwanted sales calls. While AARP’s concerns about telemarketing arose due to widespread fraudulent practices that targeted older persons (and those concerns continue), these initial concerns led to an expanded focus on effective means to reduce numerous, repeated intrusions into people’s homes by callers trying to sell myriad products and services. AARP thus has devoted significant resources for nearly a decade to all facets of federal and state telemarketing laws and regulations designed to reduce unwanted and unwelcome telemarketing sales calls, to ban fraudulent and deceptive telemarketing practices, and to provide adequate remedies for victims.

In 1995, in recognition of the fact that older people are favored targets of fraudulent telemarketers, AARP made federal and state legislative and regulatory initiatives and public education on this issue a priority. For example, AARP participated in the FTC's promulgation and subsequent revisions of the Telemarketing Sales Rule ("TSR"), submitting extensive written comments and appearing at a three-day public hearing convened by the FTC. Furthermore, AARP participated in the Commission's telemarketing rulemaking process in 2003, providing substantial comments on the effect of telemarketing on its members.[1]

In addition, AARP has been an active partner with state and federal law enforcement and consumer protection agencies, supporting the investigation and prosecution of fraudulent telemarketers. For example, in 1995, AARP members became undercover witnesses for the FBI and attorneys general, tape recording conversations with suspected fraudulent telemarketers. The recordings became the foundation for "Operation Senior Sentinel" prosecutions, as they revealed the actual misrepresentations and deceptive pitches made to convince consumers to make purchases or otherwise send money. On a related front, AARP filed *amicus* briefs in federal and state court cases involving the enforcement of telemarketing and sweepstakes statutes, and AARP attorneys have represented victims of sweepstakes promotions linked to magazine subscription packages.

AARP also has focused on educating consumers about how to identify and avoid fraudulent pitches and steps they should take to enforce their rights when they have been defrauded. AARP released several publications and public service announcements and published articles to advance this goal, and worked with state and federal law enforcement and regulatory agencies, as well as consumer and industry groups, to develop consumer education messages.[2]

AARP surveys of its members and others indicate that an overwhelming number of people view telemarketing sales calls as an invasion of privacy and have supported the creation of "do not call" lists as a way to stop these unwanted intrusions. AARP actively supports federal and state laws and regulations to reduce the number of unwanted sales calls and to give

[1] *See* Comments filed by AARP, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Privacy Act of 1991*, CG Docket No. 02-278, CC Docket No. 92-90, January 31, 2003.

consumers a say in whether they receive such calls. Since 1998, AARP has led the fight for state do not call laws and has served as one of the lead sponsors on more than twenty state do not call law campaigns. AARP also submitted comments during the FTC's proceedings to amend the TSR to create the national "Do Not Call" registry, calling it "a well-reasoned approach to address the concern AARP's members have expressed regarding their inability to stem the volume of telemarketing calls, particularly in states that currently lack Do-Not-Call laws." AARP supported creation of the national registry as long as it did not preempt states' efforts to establish stronger consumer protections.[3] In July 2002, AARP submitted testimony to Congress in connection with reauthorization of the FTC, focusing on creation of the national registry,[4] and testified before the Senate to highlight the importance of implementing and enforcing the national registry.[5]

Because of AARP's concerns about the repeated invasions of privacy and fraudulent pitches that target older people, AARP submits the following comments in the above-captioned proceeding.

(continued…)

[2] *See e.g., Off the Hook: Reducing Participation in Telemarketing Fraud at* http://www.aarp.org/research/frauds-scams/telemarketing/aresearch-import-179-D17812.html (2003); *Telemarketing Fraud and Older Americans: An AARP Survey* (1996) (on file with AARP).

[3] Letter from David Certner to Donald Clark, FTC Office of the Secretary 2 (Mar. 29, 2002) (on file with AARP).

[4] *See Hearing on Federal Trade Commission Reauthorization Before the Consumer Affairs, Foreign Commerce and Tourism Subcomm. of the Senate Commerce, Science and Transp. Comm.* (July 17, 2002) (testimony of AARP Board Member Charles Mendoza), *at* http://www.aarp.org/press/testimony/2002/071702.html

[5] *See Hearing on the National Do Not Call Registry Before the Senate Comm. on Commerce, Science and Transp.* (Sept. 30, 2003) (testimony of AARP Board Member Lee Hammond) (on file with AARP).

II. CONGRESS PASSED TWO MAIN TELEMARKETING STATUTES, NEITHER OF WHICH SUPPORTS FEDERAL PREEMPTION OF STATE TELEMARKETING LAWS

A. Congress granted federal jurisdiction to both the Commission and the Federal Trade Commission.

In 1991, Congress passed the Telephone Consumer Protection Act ("TCPA"), granting jurisdiction to the Commission to regulate the delivery and general scope of telemarketing calls.[6] Three years later in 1994, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFAPA"), granting jurisdiction to the FTC to regulate the practice and procedures used by telemarketers to solicit business from American consumers.[7] A subsequent statute, the Do-Not-Call Implementation Act of 2003, conferred jurisdiction on the FTC to establish a national do-not-call registry.[8] Accordingly, both the Commission and the FTC share jurisdiction and responsibility at the federal level for the regulation of telemarketing in the United States. This shared jurisdiction suggests that Congress intended there to be coordinated efforts among multiple authorities, and that shared power is necessary to protect consumers.

B. Congress never intended to preempt state telemarketing statutes.

The language of both the TCPA and the TCFAPA demonstrate that Congress did not intend federal preemption of state telemarketing statutes. The TCPA clearly states that state law with regard to telephone solicitations is not preempted.[9] In fact, Congress rejected proposed language that would have expressly preempted state telephone privacy laws with regard to

[6] *See* 47 U.S.C. § 227.

[7] *See* 15 U.S.C. §6101, *et seq*.

[8] *See* 15 U.S.C. §§6101-6102.

[9] *See* 47 U.S.C. §227(e)(1).

interstate telemarketing solicitations.[10] The TCFAPA goes even further. This law states, in relevant part, "Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud."[11] Here, too, the Congressional scheme clearly suggests that coordinated responses from both federal and state authorities are required to protect American consumers. The TCFAPA goes on to state that nothing in the statute "shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of *any* civil or criminal statute of such State."[12] This would appear to include state telemarketing and telephone privacy laws. This disclaimer would have been completely unnecessary had Congress intended to establish exclusive federal jurisdiction or an exclusive federal standard of regulation.

Former Senator Bryan of Nevada, sponsor of the Senate bill, argued that legislation was needed "to attack this serious and growing problem from a variety of fronts, and to pursue coordinated law enforcement efforts when possible.[13] Bryan's statement is a clear indication that Congress envisioned federal regulation of telemarketing as a floor for consumer protection, not a ceiling.[14] The Senator also noted that the "bill would permit continuation of State law in this area, to the extent that the FTC finds that State law provides an overall level of protection equal to or greater than that provided by the bill."[15]

---

[10] *See* 137 Cong. Rec. S16201 (daily ed. Nov. 7, 1991) (provision stating ". . . any provisions of State law concerning interstate communications that are inconsistent with the interstate communications provisions of this section" deleted from final version of TCPA).

[11] 15 U.S.C. §6101.

[12] 15 U.S.C. §6103(f)(1) (emphasis added).

[13] 139 Cong. Rec. S8376 (1993).

[14] *See also* 15 U.S.C. § 6101(2) (Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud.)

[15] *Id.*

C. Statutory construction requires reconciliation of TCPA and TCFAPA to permit their coexistence

It is a well established, cardinal principle of statutory construction that ". . . [w]hen there are two acts upon the same subject, the rule is to give effect to both if possible."[16] Congressional history shows no intention or express statement regarding the TCPA or the TCFAPA to suggest that their coexistence is not possible. Accordingly, neither statute may be said to trump the other with regard to the question of state preemption or jurisdiction over telemarketing.

D. Statutory construction would therefore preclude federal preemption of state telemarketing statutes.

Following the rule set forth in *Morton*, equal deference must be given to the intention of the TCPA, and the TCFAPA, which is more explicit with regard to the authority of states to regulate telemarketing. By design, the Commission shares jurisdiction over telemarketing with the FTC. Furthermore, the statutes granting jurisdiction to both agencies acknowledge jurisdiction of the states over telemarketing as an exercise of their powers to protect consumers. Accordingly, there is no legal basis to support the ACS Coalition's preemption request.

Indeed, this is an area where allowing the states to develop their own more-consumer-protective telemarketing rules is beneficial, not burdensome. Indiana and New Jersey, for example, do not allow calls to be made from telemarketers with an existing business relationship with the consumer, and North Dakota does not permit the use of automated dialers by political pollers, although the federal rules do so allow. The burden of complying with both rules is minimal for telemarketers, but the overall benefit not just to consumers, but to the dual federal system of regulation, is profound. As Justice Brandeis famously wrote in *New State Ice Co. v. Liebmann*, this allows the states to serve as "laboratories" for one another, and for the federal government.[17] If Indiana's experience with not allowing an "existing-business-relationship" exception proves successful, other states, and perhaps the Commission itself, may, on an informed basis, choose to adopt a similar rule. However, if all more-protective state laws are erased, so would be this important wellspring of information and experience.

III. STATES HAVE BROAD AUTHORITY TO ENACT AND ENFORCE CONSUMER PROTECTION LAWS AND TELEMARKETING FALLS UNDER THIS GENERAL AUTHORITY

A. Primary Responsibility for Consumer Protection Lies with the States

State attorneys general have been recognized as the "leading consumer protection force in the nation."[18] The primary source of the state attorneys general consumer protection powers is state consumer protection statutes that have been enacted over the past fifty to sixty years. In fact, "[a]ll states have a consumer protection statute that prohibits deceptive acts and practices."[19] The reach of the states' consumer protection statutes is broad and state attorneys general have the authority to "combat virtually any type of behavior found to be injurious to the consumer."[20] The statutory focus of this injurious behavior is its effect on state consumers, rather than the geographic locus from which the offense was committed. Just as a state may use its tax laws to tax an interstate phone call originating outside the state but received in the taxing state,[21] or use its criminal laws to prosecute a felon who fires a gun from across a state line to

(continued…)

[16] *See United States v. Borden Co.*, 308 U.S. 188, 189 (1939). *See also Morton v. Mancari*, 417 U.S. 535, 536 (1974) (when two statutes are capable of coexistence, they must both be regarded effective absent a clearly expressed congressional intention to the contrary).

[17] 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[18] *The Book of the States* 204 (2004).

[19] *State Attorney General Powers and Responsibilities* 208 (Lynne M. Ross ed., 1990).

[20] *Id.*

[21] *See Goldberg v. Sweet*, 488 U.S. 252 (1989).

injure or kill a person in the prosecuting state,[22] it is well- and long-established that a state may properly use its police powers to protect its residents from fraud, abuse, or nuisance, even when the wrongdoer is located outside of the state and uses telephonic communication as the means of wrongdoing. State telemarketing and telephone privacy laws have been enacted in part based on this principle. Accordingly, as part of the legitimate exercise of their police powers and responsibility for consumer protection, state legislatures have long enacted and enforced consumer protection laws against interstate callers when the effects of those callers are felt by their citizens.[23]

B. Following the example set by Congress, many states enacted telemarketing legislation, successfully incorporating elements of both the TCPA and the TCFAPA.

With the confidence expressed by Congress, many State telemarketing statutes enacted in the wake of the TCPA and the TCFAPA have been successful in deterring and punishing unwanted and fraudulent telemarketing calls in the United States. In Indiana, for example, the passage of the Telephone Privacy Law[24] has succeeded in reducing unwanted telemarketing calls

[22] *See, e.g.*, *Strassheim v. Daily* 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if [the defendant] had been present at the effect, if the state should succeed in getting him within its power."); *People v. Betts* 34 Cal. 4th 1039, 1046, (Cal., 2005) (a state may exercise jurisdiction over criminal acts that take place outside of the state if the results of the crime are intended to, and do, cause harm within the state.); *Keselica v. Virginia*, 480 S.E.2d 756, 759 (Va. App. 1997) (Maryland-based appellant who used the telephone and the mails in a continuing scheme to solicit funds from Virginia-based victims for the sole purpose of diverting their funds to his own use was found liable in Virginia.)

[23] *See, e.g.*, *People ex rel. Spitzer v. Telehublink Corp.*, 756 N.Y.S.2d 285 (N.Y. App. Div. 2003) (reviewing New York state law action against a Delaware corporation that sold a discount benefits package to customers throughout the United States by telephone calls from Montreal); *Commonwealth v. Events Int'l, Inc.*, 585 A.2d 1146, 1148, 1151 (Pa. Commw. Ct. 1991) (permitting state consumer fraud action alleging that company telephoned Pennsylvania consumers from Florida to solicit fraudulent contributions); *State v. Cain*, 757 A.2d 142 (Md. 2000) (finding jurisdiction where Georgia resident induced a victim through email and telephone conversations to mail a check to Georgia for goods that were in poor condition); *State v. Rowell*, 908 P.2d 1379 (N.M. 1995) (holding that defendant violated state's computer fraud statute when he telephoned New Mexico residents from Florida); *State v. Minimum Rate Pricing, Inc.*, 1998 WL 428810 (Minn. Dist. Ct. 1998) (rejecting preemption of attorney general action to enjoin apparently interstate fraudulent telemarketing to Minnesota residents in violation of the state's consumer protection statutes); *State v. Western Express Serv. Co.*, 1995 WL 911525 (Ohio Com. Pl. 1995) (ordering defendant, a Nevada corporation, to stop its interstate telemarketing fraud in violation the state's Consumer Sales Practices Act).

[24] IND. CODE § 24-4.7-1, *et seq. (2005).*

to residents dramatically, declining from an average of 12.1 calls per week to 1.9 calls per week, a decline of over 80%.[25] Congress recognized that despite the best intentions of the Commission and the FTC, comprehensive federal enforcement of telemarketing regulation was not possible without state action, given the limited resources of both agencies available to address consumer protection.[26]

C. State Telemarketing Statutes Provide Effective Means of Consumer Protection to Their Citizens

Surveys conducted for AARP to gauge support for state "do-not-call" lists established that consumers receive numerous telemarketing calls, overwhelmingly view these calls as unwanted intrusions into their privacy, and favor having the choice to opt out of receiving those calls. For example, in a survey of Minnesotans aged eighteen and over, more than three-fourths (77%) of respondents indicated they received telemarketing calls more than once a week. Ninety percent of respondents expressed negative views toward these calls, with 82% saying they are an invasion of privacy and an unwelcome intrusion, 6% calling them a consumer rip-off, and 2% saying they are annoying.[27] Most (94%) Minnesota residents indicated strong (89%) or some (5%) support for a new state law that would give people the option of placing their name and phone number on a do-not-call list so that telemarketers would be prohibited from calling them; almost 90% said they were very (75%) or somewhat (14%) likely to register for such a list if given the option.[28]

---

[25] *See* Comments filed by the State of Indiana in Opposition to the Consumer Bankers Association's Petition to for Declaratory Ruling, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, CC Docket No. 92-90, February 2, 2005 at 1.

[26] *See* 16 U.S.C. § 6103(f).

[27] Joanne Binette, AARP, *Minnesota Telemarketing Fraud and "Do Not Call" List: An AARP Survey* 2 (2001), *at* http://research.aarp.org/consume/mn_telemarketing.pdf.

[28] *Id.* at 3.

A survey of New Hampshire residents eighteen and older produced similar results. The vast majority of respondents expressed negative views of telemarketing calls, with 84% viewing them as an invasion of privacy and unwanted intrusion, and another 10% saying they are a consumer rip-off.[29] This survey was conducted after the FTC proposed a national registry, and most (94%) New Hampshire residents strongly (85%) or somewhat (9%) supported a new state do-no-call list that would provide greater protection than the national list.[30] Similarly, nearly three-fourths (74%) of New Jersey residents eighteen and older received telemarketing calls more than once a week, and 90% expressed negative views of such calls: 77% viewed them as an invasion of privacy and an unwelcome intrusion, 10% said they are a consumer rip-off, and 3% characterized them as annoying.[31] Most (94%) respondents strongly (89%) or somewhat (5%) supported a new state law that would give them the option of placing their names and phone numbers on a do not call list to stop telemarketers from calling them.[32] Similar results were found in Michigan, Missouri, and South Dakota.[33]

D. <u>The Commission has acknowledged the role of the states in protecting consumers from abusive telemarketing.</u>

The Commission acknowledged the role of the states in its July 3, 2003, Report and Order, where it stated that "[t]he record . . . indicates that states have historically enforced their

---

[29] Joanne Binette, AARP, *Minnesota Telemarketing Fraud and "Do Not Call" List: An AARP Survey* 2 (2001), *at* http://research.aarp.org/consume/mn_telemarketing.pdf.

[30] *Id.* at 2.

[31] Katherine Bridges, AARP, *AARP New Jersey Telemarketing and "Do Not Call" List Survey* 4 (2002), *at* http://research.aarp.org/consume/nj_telemarketing.pdf.

[32] *Id.* at 5.

[33] *See* Jennifer Sauer, AARP, *Michigan Telemarketing Fraud and "Do Not Call" List: An AARP Survey* (2001), *at* http://research.aarp.org/consume/mi_telemarketing.pdf; Joanne Binette, AARP, *Missouri "Do Not Call" List: An AARP Survey* (2002), *at* http://research.aarp.org/consume/mo_telemarketing.pdf; Mildred DePallo, AARP, *South Dakota "Do Not Call" List: An AARP Survey* (2002), *at* http://research.aarp.org/consume/sd_telemarketing.pdf.

own state statutes within, as well as across state lines."[34] The cases cited herein not only reinforce the accuracy of the Commission's statement, but also underscore the notion that the harm caused by telemarketing is directed towards consumers, falling within the realm of consumer protection, which, as discussed above, is generally the province of the states. As explained above, the primary responsibility for consumer protection traditionally lies with the states.

E. <u>Commission preemption of the interstate application of state telemarketing laws would leave consumers vulnerable and exposed.</u>

Commission preemption of the interstate application of state telemarketing laws would affect more than the do-not-call provisions of such statutes, or the manner in which legitimate businesses market their products to consumers. Preemption would limit states' abilities to protect their citizens from fraud, harassment, and even obscene phone calls, the prohibition against which is included in many state statutes across the country.

For purposes of understanding the limits of the Commission's exclusive jurisdiction under Section 2 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, there is no principled distinction between a state law that forbids an interstate telephone call because it contains a lie or obscene language and a state law that forbids an interstate telephone call because it contains an unwanted sales pitch. Therefore, if the Commission accepts the ACS Coalition's belief that the Commission's exclusive jurisdiction includes the content of interstate phone calls as well as the facilities over which they are made, it would assume full responsibility for protecting all consumers nationwide for injuries suffered over an interstate phone call, whether related to a mistake by a legitimate telemarketer, fraud, harassment, or obscenity. Despite the best of intentions, there is no feasible way in which the

[34] In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and

Commission would be able to address all such complaints, given that telemarketing is but one of many issues that the Commission must address, and a secondary one at that. It would be up to the Commission, for example, to protect the older Americans who were defrauded in a telemarketing scam in which they were told that they had won an award but first had to send in a promotional fee.[35] Given the scope of the Commission's jurisdiction and the sheer volume of complaints already addressed by the Commission in a given year, there would be no guarantee that the grievances of these people would have received sufficient attention, or that the offending parties would have been held accountable before they had harmed someone else. The answer is to allow the states to continue to do what they have traditionally done and what they do best - protect their consumers.

IV. CONCLUSION

For the foregoing reasons, the Commission should reject the petition of the ACS Coalition to declare that the Commission has exclusive jurisdiction over interstate telemarketing, and should further reject all petitions to declare state telemarketing laws preempted.

Respectfully submitted,

David Certner
Director, Federal Affairs

AARP
601 E Street, N.W.
Washington, DC 20049

July 29, 2005

(continued…)
Order, 18 FCC Rcd. 14014, 14062 ¶ 78 (2003).

[35] *See State v. Khalsa*, 542 N.W.2d 263 (Iowa Ct. App. 1995).